

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NOS. 2021-88-E

SURREBUTTAL TESTIMONY OF STEVEN J. LEVITAS
ON BEHALF OF
THE CAROLINAS CLEAN ENERGY BUSINESS ASSOCIATION

August 16, 2021

1 **Q. PLEASE STATE YOUR NAME, TITLE AND BUSINESS ADDRESS.**

2 **A.** I am Steven J. Levitas, Senior Vice President for Regulatory and Government Affairs for
3 Pine Gate Renewables, LLC. My business address is 130 Roberts Street, Asheville, North
4 Carolina 28801.

5 **Q. DID YOU FILE DIRECT TESTIMONY IN THIS MATTER?**

6 **A.** Yes. I filed 19 pages of direct testimony on July 27, 2021.

7 **Q. WHAT IS THE PURPOSE OF YOUR SURREBUTTAL TESTIMONY?**

8 **A.** I am responding to issues raised regarding my direct testimony by Dominion witnesses
9 Kassis and Folsom.

10 **Q. ARE YOU SPONSORING ANY EXHIBITS?**

11 **A.** Yes. I am submitting Exhibit SJLR-1, a July 11, 2021 “Today in Energy” report from the
12 US Energy Information Administration.

13 **Q. IS MR. KASSIS CORRECT THAT YOU ARE TESTIFYING ON BEHALF OF**
14 **THE CAROLINAS CLEAN ENERGY BUSINESS ASSOCIATION (“CCEBA”)?**

15 **A.** Yes, I am testifying at the request of, on behalf of, and with the approval and
16 authorization of CCEBA. CCEBA advocates on behalf of its members before the
17 Commission regarding the important issues at stake in this proceeding, including avoided
18 cost rates, form power purchase agreements (PPAs), and notice of commitment forms
19 under South Carolina’s implementation of the Public Utility Regulatory Policies Act of
20 1978, 16 U.S.C. § 824a-3 (PURPA). I am on the CCEBA Board of Directors and am
21 closely involved in the organization’s regulatory efforts, including its participation in this
22 docket. The issues on which I testified in this proceeding, like the ones I addressed in the
23 preceding DESC Docket 2019-184-E, directly impact the interests of independent clean

1 energy businesses that comprise the CCEBA membership, including Pine Gate
2 Renewables.

3
4 **Q. IS MR. KASSIS CORRECT THAT THAT THIS COMMISSION HAS REJECTED**
5 **THE “COMMERCIAL REASONABLENESS” STANDARD FOR REVIEWING**
6 **TERMS AND CONDITIONS FOR PURPA PROJECTS?**

7 **A.** No, Mr. Kassis’ testimony on this issue is quite remarkable. As noted in my direct
8 testimony, the standard of “commercial reasonableness” with respect to PURPA PPAs is
9 legally required under South Carolina law, and pursuant to such law has been previously
10 applied by the Commission in this context. Act 62, better known as the Energy Freedom
11 Act, requires that the Commission “treat small power producers on a fair and equal
12 footing with electrical utility-owned resources by ensuring” that: (1) “rates for the
13 purchase of energy and capacity fully and accurately reflect the electrical utility's avoided
14 costs;” (2) “power purchase agreements, including terms and conditions, *are*
15 *commercially reasonable* and consistent with regulations and orders promulgated by the
16 Federal Energy Regulatory Commission implementing PURPA;” and (3) the electrical
17 utility's avoided cost methodology fairly accounts for costs avoided by the electrical
18 utility or incurred by the electrical utility, including “energy, capacity, and ancillary
19 services provided by or consumed by small power producers including those utilizing
20 energy storage equipment.” S.C. Code Ann. 58-41-20 (B) (emphases added). My
21 testimony touches on all three elements in evaluating the terms and conditions in DESC’s
22 form PPA and NOC. While the Commission chose not to insert the phrase “commercial
23 reasonableness” into DESC’s documents in the 2019 docket, it applied the required

1 “commercially reasonable” standard in reviewing those documents and in modifying
2 them consistent with the testimony I provided in that docket.

3 I should note that, as set forth in my direct testimony, the standard of commercial
4 reasonableness is not one-sided in favor of clean energy; rather, it strikes a reasonable
5 balance between promoting QF development and protecting ratepayer interests. Contract
6 terms that make it extremely difficult or impossible to finance QF development do not
7 strike that balance and are discriminatory towards QFs.

8 **Q. DO YOU AGREE WITH MR. KASSIS’ ASSERTION THAT YOUR TESTIMONY**
9 **OFFERS ONLY INDIVIDUAL “OPINION, WITHOUT MORE”?**

10 **A.** No. Like any expert witness, my opinions are based on my professional experience and
11 knowledge. As detailed in my direct testimony, I have more than ten years of experience
12 in the renewable energy industry, which has included extensive involvement in the
13 negotiation of individual power purchase agreements as well as serving as both counsel
14 and an expert witness in multiple proceedings on the subject of form PPAs. My
15 testimony, along with that of Mr. Kassis, was considered in the 2019 docket and on the
16 overwhelming bulk of issues the Commission found my testimony persuasive and
17 adopted recommended changes to DESC’s PURPA documents based on it, making them
18 more commercially reasonable. In that docket I endeavored to give reasoned
19 explanations and suggest measured changes based on my extensive commercial
20 experience. I have done the same thing here. I don’t understand DESC to be challenging
21 my qualifications as an expert witness, but I would note that I have frequently been
22 invited to make presentations on PURPA at industry meetings and continuing legal
23 education programs and have had extensive involvement in several states and in

1 proceedings before the Federal Energy Regulatory Commission (FERC) and in the
2 federal courts concerning the requirements for formation of a legally enforceable
3 obligation (LEO) under PURPA.

4 **Q. HAS DESC AGREED TO WITHDRAW ANY OF THE PROPOSED CHANGES**
5 **TO ITS FORM PPA BASED ON YOUR TESTIMONY?**

6 **A.** Yes. As explained by DESC witness Folsom, DESC has agreed to keep cash collateral as
7 an express option for Performance Assurance in the Form PPA. We appreciate DESC's
8 agreeing to that and believe it preserves a commercially important option for solar
9 developers. I should note, however, that the reason cash collateral has not been used by
10 developers for Performance Assurance (as Witness Folsom points out) is because this
11 Commission previously approved a reasonable form Surety Bond option, which DESC
12 now proposes to eviscerate.

13 **Q. HAS DESC JUSTIFIED ITS PROPOSED CHANGES TO THE FORM OF**
14 **SURETY BOND?**

15 **A.** No. My testimony set forth two problems with DESC's changes to the Form of Surety
16 Bond: (1) reducing the pay period from 15 days to 10 days after demand and (2) requiring
17 that a Surety waive *all* rights and defenses, counterclaims, setoffs, cross-claims, or any
18 other claims. As I explained, these conditions are unjustified and will likely make surety
19 bonds much more expensive or not available at all. In rebuttal, Witness Folsom says the
20 new conditions are justified to "ensure" that DESC's customers are adequately protected
21 and that DESC's parent company has "utilized [them] in the marketplace for several
22 years.". But Mr. Folsom has offered no evidence whatsoever that the current
23 requirements have not protected customers, and his general statements about DESC's

1 corporate practice do not show that these are commercially reasonable terms in South
2 Carolina, where the prior language has been used for some years. Indeed, Mr. Folsom
3 carefully avoids stating that developers in other states have actually been able to obtain
4 surety bonds using the proposed onerous form; it would surprise me very much if that is
5 the case. The proposed changes to the Form of Surety Bond should be rejected.

6
7 **Q. HAS DESC RETAINED ITS PROPOSED INSURANCE CHANGES?**

8 **A.** It has. In my opening testimony, I discussed problems with two proposed changes: (1)
9 new timing for certificate of insurance delivery, and (2) revised coverage amounts. The
10 current PPA requires that a certificate of insurance be delivered “at least fifteen calendar
11 days” before the start of work at a Facility, but the proposed PPA requires delivery
12 “within 20 days of Buyer’s request.” In response to my objection that this would give
13 DESC unfettered discretion to require proof of insurance far in advance of any possible
14 construction activities, DESC witness Folsom states that requests for insurance
15 certificates under existing PPAs “have not been problematic for developers,” and that
16 ensuring that a project facility maintains insurance is important for complex and costly
17 facilities, and that “DESC does not intend to utilize this provision to create an
18 administrative burden.” (Folsom Rebuttal 4.) But the fact that the existing requirement
19 hasn’t been a problem for developers is not a rationale for changing it. To the contrary,
20 requiring proof of insurance of a project that is nowhere close to breaking ground
21 conflicts with DESC’s commendable goal of avoiding needless administrative burdens.
22 Mr. Folsom provides no evidence that DESC has been adversely affected by the current
23 provision or any rationale for why it should be changed. Where a utility seeks to change

1 form contract terms for which it has previously sought and obtained Commission
2 approval, it should be required to make a compelling case as to why the requested change
3 is needed.

4 My direct testimony also objected to increased coverage amounts, which were
5 justified simply as being consistent with Dominion's corporate practice. Witness Folsom
6 now offers a new rationale: the increased coverage amounts are needed due to the use of
7 "emergent" technologies such as storage and facilities having capacities in excess of
8 80MW-DC. Mr. Folsom suggests that increased coverage amounts are needed because
9 these potential changes in facility design increase the value of the facility that needs to be
10 insured as well as creating safety concerns that potentially increase risk of loss.

11 However, he offers no evidence that either concern is material enough to justify imposing
12 additional costs on all QF developers. Mr. Folsom does not cite a single instance in
13 which QF insurance coverage has been needed to protect DESC and its ratepayers from
14 loss, let alone one where the current coverage levels have proved to be inadequate. In the
15 highly unlikely event that there would be any form of casualty loss at a solar facility, the
16 developer and its financing parties have a huge economic interest in ensuring that the
17 facility is returned to normal operation as soon as possible. In the equally unlikely event
18 of a third-party claim, there is very little prospect of such a claim being successfully
19 made against DESC for the negligent or intentional acts of a QF developer, operator, or
20 their agents. I am not aware of any case in which a solar QF with a battery storage device
21 has suffered operating losses due to the storage device. On the contrary, the addition of
22 storage devices increases the ability of the facility to delivery energy and capacity on a
23 consistent, reliable basis. Battery storage is a mature and quickly moving technology that

1 is being deployed across the nation to augment renewable power and provide critical grid
2 services. The scale of deployment has accelerated rapidly in the U.S. and the U.S. Energy
3 Information Agency expects 4.3 GW of new battery power capacity additions to come
4 online in America in 2021. (See Exhibit SJLR-1.) The world's largest solar-powered
5 battery (409 MW) is under construction at Manatee Solar Energy Center in Florida and
6 scheduled to be operational by late 2021, there is at least one storage facility operational
7 in DESC's territory and more on the way. While it is true that the addition of storage
8 components to QF facilities increases their economic value, that alone is not a basis for
9 doubling coverage amounts for personal injury, workers compensation, and automobile
10 liability insurance. Ad hoc increases in the amount and scope of insurance needlessly
11 increases the cost of QF projects and CCEBA believes the current required coverage
12 levels be maintained with new automobile minimum coverage limited to one-million
13 dollars (\$1,000,000).

14 **Q. DO DESC'S RESPONSES TO YOUR CONCERNS REGARDING PROPOSED**
15 **CHANGES TO THE NOTICE OF COMMITMENT ("NOC") FORM RESOLVE**
16 **THE ISSUES RAISED IN YOUR DIRECT TESTIMONY?**

17 **A.** In one case, but not in the two others.

18 **Q. HAS DESC SATISFACTORILY ADDRESSED YOUR OBJECTION TO ITS**
19 **PROPOSED LANGUAGE REGARDING SITE CONTROL?**

20 **A.** No. In item 4(iii), DESC proposes to require the QF has either commenced construction
21 or taken meaningful steps to obtain control of the Project Site "in order to commence
22 construction of the Facility." DESC has responded to my testimony by saying that its
23 proposed language did not "require commencement of construction, only that the seller

1 takes meaningful steps to obtain control such that it could commence construction.”
2 (Folsom Rebuttal at 8) (emphasis original.) To clarify its intent, DESC has proposed to
3 alter the proposed language to say that a QF must have taken meaningful steps to obtain
4 site control “adequate” to commence construction rather than “in order” to commence
5 construction.

6 Unfortunately this does not solve the problem, and arguably makes its worse. Site
7 control “adequate” to commence construction could be read to require outright ownership
8 or a fully executed leasehold interest of land to form a LEO. By contrast, under the
9 current NOC form an option to exercise such property interests can suffice to show
10 sufficient site control for a LEO – recognition that even with a commitment to sell, a
11 developer faces considerable project risk prior to entering into the interconnection study
12 process. Although FERC may have authorized a reference to commencement of
13 construction, it does not require it, and I can see no reason to mention commencement of
14 construction at all in connection with the site control requirement. It is hard to discern
15 what the meaning or intent of such a qualifier is in this context would be and I think such
16 ambiguity creates unnecessary potential for disputes and litigation. However, if it would
17 be a helpful clarification, I see no problem with stating that the Project Site must be of
18 sufficient size to allow construction of the Facility as proposed.

19 **Q. HAS DESC SATISFACTORILY ADDRESSED YOUR OBJECTION THAT A**
20 **LEO SHOULD NOT BE CONTINGENT UPON APPLYING FOR ALL LOCAL**
21 **PERMITS AND ZONING APPROVALS?**

22 **A.** No. In item 4(iv), DESC proposed that the QF prove it has submitted the applications
23 and filing fees necessary to secure “all local permitting and zoning approvals” for the site

1 “necessary to operate and maintain the Facility” for the delivery term. I testified that
 2 many local permits, such as electrical permits, building permits and stormwater plan
 3 approvals cannot be, and are not typically, applied for until close to the time that
 4 construction commences. Witness Folsom’s primary response is that FERC, in its Order
 5 872, has authorized the states to require that all permit application be made as a condition
 6 of LEO formation. The fact that FERC has given this Commission such latitude does not
 7 mean that it should exercise it, especially where doing so would frustrate QF
 8 development and the clear legislative intent of Act 62 to promote QF development.
 9 Preventing LEO formation, and thus denying QF developers price certainty, until the very
 10 end of the development cycle would make it virtually impossible to incur the substantial
 11 development costs required to bring a QF to the point of commencing construction. As
 12 an aside, I doubt that FERC had in mind these types of permits that can only be secured
 13 on the eve of construction. Such a literal interpretation would be inconsistent with other
 14 statements of policy regarding LEO formation expressed by FERC in Order 872. For
 15 example, FERC stated that:

16 [t]he intent of these factors is to provide a reasonable balance between
 17 providing QFs with objective and transparent milestones up front that are
 18 needed to obtain a LEO, allowing states the flexibility to establish factors
 19 that address the individual circumstances of each state, and increasing
 20 utilities’ ability to accurately plan their systems.

21 Order No. 872 at p. 688 (emphasis added).

22 **Q. IS THE MODIFIED LANGUAGE PROPOSED BY WITNESS FOLSOM ON THIS**
 23 **ISSUE HELPFUL?**

24 **A.** No, it is not. In his rebuttal testimony, DESC Witness Folsom offers new language that
 25 would require the project developer to prove it has submitted the applications and filing

1 fees necessary to secure local permitting and zoning approvals for the site “necessary to
2 *commence construction* of the Facility” rather than as necessary to operate and maintain
3 it. While we appreciate the willingness of DESC to consider alternate language, this
4 proposed revision does nothing to address the problem identified in my testimony: a
5 developer is unlikely to be able to apply for construction-related permits, which requires
6 engineered site layout plans, until shortly before construction commences. Application
7 for such permits is thus not a reasonable test of a QF developer’s commitment to selling
8 its output to the utility, which is the operative consideration for LEO formation. As noted
9 in my direct testimony and unchallenged by DESC’s witnesses, this requirement is also
10 unnecessary since the form PPA requires that such permits be obtained. DESC’s
11 proposed changes should not be approved and the existing NOC language should be
12 retained.

13 **Q. REGARDING NOC ITEM 8(ii), HAS DESC AGREED TO YOUR PROPOSED**
14 **LANGUAGE REGARDING TERMINATION FOR FAILURE TO SIGN A PPA?**

15 **A.** Yes it has, and we appreciate the Company’s willingness to revise this term. As
16 originally proposed, Item 8(ii) provided that the NOC would terminate if the Seller had
17 not executed a PPA within 90 days of the NOC’s submittal regardless of whether a PPA
18 has been tendered by the utility – a condition beyond the Seller’s control. I proposed
19 revising 8(ii) to say that the NOC terminates “the later of (i) within 90 business days after
20 the Submittal Date, or (ii) within 60 business days after receipt of an executable PPA
21 from Company.” That language is now contained in the proposed NOC form attached to
22 Witness Folsom’s testimony.

1 **Q. HOW HAS DESC RESPONDED TO YOUR TESTIMONY REGARDING**
2 **ANCILLARY SERVICES?**

3 **A.** It has confirmed the need for clarification. As set forth in my direct testimony, DESC's
4 proposed PPA defines "Energy" to include ancillary services like reactive power and
5 voltage control and asserts that these "belong to Buyer at no additional cost to Buyer"
6 beyond the rates paid for avoided energy. I testified that this is not just and reasonable if
7 such services are not included in the calculation of avoided cost rates and QFs are not
8 otherwise compensated for providing these valuable services. In his rebuttal, Witness
9 Kassis confirms at page 11 that ancillary services are *not* included in the calculation of
10 avoided costs, but then states at page 13 that the form PPA language giving those to
11 DESC "at no additional cost" does not "preclude DESC from negotiating with a QF
12 generator capable of providing such services" when DESC needs them.

13 The end result is not only confusing – it runs afoul of Act 62, which requires that
14 the Commission treat small power producers on a "fair and equal footing with electrical
15 utility-owned resources" by ensuring that avoided cost rates "fully" reflect the utility's
16 avoided costs with a methodology that "fairly accounts" for costs avoided "*including . . .*
17 *ancillary services* provided by or consumed by small power producers including those
18 utilizing energy storage equipment." S.C. Code 58-41-20(B) (emphasis added). At a
19 minimum, the Commission should require DESC to remove the language in the PPA
20 purporting to give DESC ancillary services for free.

21 **Q. DO YOU HAVE FURTHER RESPONSES TO WITNESS KASSIS' REBUTTAL**
22 **TESTIMONY REGARDING ANCILLARY SERVICES?**

1 **A.** Yes. First, Witness Kassis contends that compensation for ancillary services needs to be
2 determined on a case-by-case basis. If the Commission agrees with that approach, it
3 should require DESC to adopt a transparent, commercially reasonable, Commission-
4 approved process for making such determinations. Second, Mr. Kassis acknowledges
5 that reactive power is a valuable service provided by generators to DESC in its separate
6 role as transmission system operator. Given that DESC's form interconnection
7 agreement (IA), approved by this Commission, expressly provides for compensation to
8 generators for reactive power, the Commission needs to address whether reactive power
9 is more appropriately addressed by the PPA or the IA.

10 **Q. WHAT IS DESC'S RESPONSE TO YOUR TESTIMONY REGARDING**
11 **CHALLENGES POSED BY A VARIABLE INTEGRATION CHARGE TO**
12 **FINANCING QF PROJECTS?**

13 **A.** Witness Kassis asserts that because most of the 17 projects with VIC language in their
14 PPAs have reached commercial operation, a variable VIC is not commercially
15 problematic. Some context is needed for me to respond to this statement. Prior to this
16 Commission's orders in Docket No. 2019-184-E, DESC and its predecessor SCE&G had
17 never been authorized to impose a VIC on QFs or to account for variable integration
18 costs in avoided cost rates, and it had not done so. However, the utility did enter into a
19 number of PPAs that provided that any VIC subsequently approved by the Commission
20 would be incorporated into the PPA. I don't disagree that developers were able to
21 finance and construct QFs notwithstanding this uncertainty, though my understanding is
22 that it did make financing more challenging. But given that these projects have been
23 placed in operation, those financings may well have occurred before the Commission

1 definitively decided to authorize a VIC and before DESC proposed a very high VIC in
2 Docket No. 2019-184-E. Since those two events occurred, the risk proposition for
3 developers and their financing parties has changed dramatically. The more relevant
4 benchmark – and the question this Commission may wish to ask Dominion – is how
5 many PPAs have been executed and how many projects have been financed and placed in
6 service *since* an indeterminate VIC has been included in avoided cost rates. I am not
7 aware of any.

8 **Q. IS AN INDETERMINATE VIC CONSISTENT WITH ACT 62?**

9 **A.** No, it is not. Section 58-41-20(F)(1) of the South Carolina Code of Laws provides that
10 “[e]lectrical utilities, subject to approval of the commission, shall offer to enter into *fixed*
11 price power purchase agreements with small power producers for the purchase of energy
12 and capacity at avoided cost” (emphasis added). In adopting this provision, the General
13 Assembly recognized that certainty regarding contracted cash flows is essential to
14 promoting QF development. Contrary to this statutory mandate, DESC’s PPAs that
15 include either a VIC or an avoided cost rate that is subject to modification and true up
16 based on future analysis and regulatory proceedings is not a “fixed” PPA.

17 **Q. HOW DO YOU RECOMMEND THAT THE COMMISSION DEAL WITH**
18 **ONGOING UNCERTAINTY ABOUT THE APPROPRIATE AVOIDED COST**
19 **RATE?**

20 **A.** DESC bears the burden of proof in establishing an appropriate level of variable
21 integration costs. To the extent it has not succeeded in doing so, despite having had
22 several years to do so, the Commission should either eliminate the VIC altogether or
23 adopt a reasonable level of variable integration cost that is fixed for the current term of all

1 existing PPAs subject to the VIC or entered into prior to any adjustment in DESC's
2 variable integration costs by this Commission.

3 **Q. IS THERE ANY PRECEDENT FOR THIS APPROACH?**

4 **A.** Yes. This is exactly the approach taken by Duke Energy and approved by both this
5 Commission and the North Carolina Utilities Commission pursuant to settlement
6 agreements. In both states, the avoided cost rate paid by Duke to QF developers includes
7 a fixed reduction for variable integration costs based on what was deemed to be a
8 reasonable, if imperfect, estimate of such costs at the time. Those developers will be
9 subject to any modifications in variable integration costs in effect at the time they renew
10 their PPAs.

11 **Q. DOES THIS CONCLUDE YOUR TESTIMONY?**

12 **A.** Yes.